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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 338

DONALD CROOM BEATTY, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Northern District of Alabama, which judgment was adverse to Petitioner.

OPINIONS BELOW

There was no formal opinion of the District Court. The judgment of conviction and commitment entered by that Court is reproduced in Appendix D to this petition.

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. It is reproduced in Appendix A to this petition. The judgment of the Court of Appeals affirming the judgment of the District Court is reproduced as Appendix B to this petition, and the order of the Court of Appeals denying petition for rehearing is reproduced as Appendix C to this petition.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals (R. 378-405, 406; Appendices A and B) were entered on May 2, 1967. Timely petition for rehearing was filed (R. 407-428). Petition for rehearing was denied on June 12, 1967 (R. 429; Appendix C).

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1254 (1), 28 U.S. Code, Sec. 1651 (a), 28 U.S. Code, Sec. 2106, and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Circumstances of the Case

Petitioner was convicted in the United States District Court for the Northern District of Alabama following a trial by jury, under two counts of an indictment charging violations of 26 U.S. Code, Sec. 5851 and 26 U.S. Code, Sec. 5814 (a), respectively (R. 4). The judgment of conviction was affirmed by the United States Court of Appeals for the Fifth Circuit (R. 406; Appendix B), and petition for rehearing was denied (R. 429; Appendix C).

The Questions

Petitioner engaged in a series of transactions in his place of business and his residence with a government

informer carrying a concealed radio transmitter. The contents of the conversations between them were testified to by the informer and by government agents who overheard the conversations on a radio receiver. Subsequent to indictment, and while Petitioner was at liberty on bail, Petitioner and the informer engaged in a conversation in the informer's automobile. Petitioner's attorney was not present. A government agent was secreted in the trunk of the automobile. The informer and the agent testified to the contents of the conversation taking place on that occasion. Under the circumstances, was Petitioner deprived of rights protected by the:

1) Fourth Amendment or due process clause of the Fifth Amendment when testimony of the informer and government agents concerning pre-indictment transactions of the informer with the Petitioner was admitted on trial;

2) Fourth Amendment, the due process clause of the Fifth Amendment, the self-incrimination clause of the Fifth Amendment, or the right to counsel guaranteed by the Sixth Amendment when the trial court admitted into evidence the testimony of the informer and the secreted government agent concerning the post-indictment conversation between Petitioner and the informer?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner, a registered firearms dealer, was charged by indictment in four counts with violating the National Firearms Act (R. 4). The verdict of the jury convicted Petitioner under two counts of possessing a certain firearm upon which taxes imposed by law had not been paid, and of transferring that firearm without having obtained a written order from the transferee as required by law (R. 27).

The principal witness against Petitioner was one Sirles, a convicted felon (R. 84), who functioned as a government informer throughout a series of transactions with Petitioner (R. 70-71). Sirles was equipped by government agent McGinnis with a shortwave radio device secreted on his person when he made a trip to Petitioner's place of business early on December 7 (R. 72). He discussed the pur-

chase of a certain weapon with Petitioner, according to his testimony, but did not undertake to purchase it until he ascertained whether the A.T.T.U. agents desired that he purchase it (R. 74-75). After talking to the agents, he called Petitioner later in the day to advise that he did desire to purchase the weapon (R. 76), and an appointment was made for the early evening. Sirles met with Federal agents prior to returning to Petitioner's place of business and was provided marked money and the same radio transmitter (R. 77). He kept his appointment with Petitioner, and they conversed in Petitioner's place of business and in Petitioner's home (R. 78-79). Sirles then met the government agents and handed them his acquisition (R. 80). Supervisor Stevenson of the Alcohol and Tobacco Tax Division, Internal Revenue Service, testified that he overheard the conversation between Petitioner and Sirles early on the date of December 7 by means of a radio receiver which he had in the automobile parked some distance from Petitioner's store, and he was allowed to testify to the contents of that conversation (R. 122-123). The same agent also overheard the conversations that evening in Petitioner's place of business and at his home, by use of the same radio devices (R. 123-126). Special Agent McGinnis also was allowed to testify to the conversations between Petitioner and Sirles which he overheard over a radio receiver (R. 155-160).

The indictment in this case was returned and filed in open court on February 10, 1965 (R. 4). On February 18, 1965, while Petitioner was on bail, he and Sirles met outside a restaurant (R. 109). Sirles testified that Petitioner had requested that they meet (R. 110). Sirles testified to the contents of the conversation at that time, and this testimony was very damaging (R. 110-117). It developed subsequently in the trial that Agent McGinnis was present at the meeting of February 18, and that he was in the trunk

of the informer's automobile, while the conversation between Petitioner and informer took place inside the car (R. 348-349). Other agents were present, parked in automobiles about the parking lot (R. 349). Agent McGinnis was allowed to testify to the contents of the conversation (R. 349-351). He stated that he also had a recorder operating in the trunk of the informer's car, but it broke (R. 353). Agent McGinnis had entered the trunk of Sirles' automobile at Sirles' place of business (R. 354). The informer testified earlier that, when Petitioner contacted him concerning the meeting of February 18, he contacted Agent McGinnis by telephone and inquired whether he should meet Petitioner, and McGinnis directed him to meet the Petitioner (R. 116-117). The arrangements for McGinnis to enter his car and to overhear the conversation from the trunk obviously were made at this time.

Petitioner testified that he had met the informer, Sirles, near the restaurant in question on several occasions, although he could not recall arranging a meeting shortly after the return of the indictment (R. 312-313). The admission of testimony covering the conversations referred to was urged as error on motion for new trial (R. 39), and on appeal to the Fifth Circuit Court of Appeals (R. 382-383).

REASONS FOR GRANTING THE WRIT

I

Rights protected to the Petitioner by the Fourth and Fifth Amendments to the Constitution of the United States were violated by the admission of testimony relating to conversations between Petitioner and a secret government informer, prior to indictment, when the informer had secreted on his person a radio transmitter through which Federal agents overheard the conversation.

This Court upheld convictions in early cases involving the use of electronic devices against contentions of Fourth

Amendment violations, where it found that there had been no physical trespass in connection with the interception of conversation. *Goldman* v. *United States*, 316 U.S. 129 (1942). *On Lee* v. *United States*, 343 U.S. 747 (1952). Later, in a case where it appeared that there was no physical trespass, but that a spike with a microphone attachment was inserted into a party wall to a point where it made contact with a heating duct serving the defendant's residential premises, by means of which conversation therein could be overheard, the Court found that there had been an intrusion into a constitutionally protected area. *Silverman* v. *United States*, 365 U.S. 505 (1961). This decision and the subsequent case of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), lead to a clear enunciation of the rule that verbal evidence, as well as tangible items, is entitled to be protected by the Fourth Amendment from unconstitutional seizure.

More recently, the Court had for consideration the case of *Osborn* v. *United States*, 385 U.S. 323 (1966). There, a witness who was a police officer recorded conversations had with an attorney who knew his official character, concerning the bribery of jurors in a case on trial in a United States District Court. There was, in fact, no "eavesdropping" in the ordinary sense. The opinion recognizes that the indiscriminate use of such devices in law enforcement creates grave constitutional questions under the Fourth and Fifth Amendments, and imposes a very heavy responsibility on this Court in its supervisory capacity. The admission of the recording was upheld because of prior judicial approval of its making, under circumstances sufficiently restrictive to satisfy the requirements of the Fourth Amendment. The authorization was based upon an affidavit previously executed by the witness, and was given for the narrow purpose of ascertaining the truth of the allegations therein.

The procedures in *Osborn* were compared with the requirements of a New York statute dealing with electronic eavesdropping in *Berger* v. *New York*, _____ U.S. _____ (June 12, 1967), and the statute was found to afford inadequate protection against the violation of rights guaranteed by the Fourth Amendment. The statute authorized the issuance of ex parte orders for eavesdropping upon oath of prosecuting attorneys or senior police officers, and required the Judge issuing the order to satisfy himself of the existence of reasonable grounds therefor. The opinion holds that the statute creates a serious "probable cause question," and that it lacks sufficient particularity in its requirements concerning the description of the place to be searched, and the persons or things to be seized. This opinion holds that the making of the recording in *Osborn* was an invasion of the privacy protected by the Fourth Amendment, but that it was admissible because of the numerous and precise safeguards attendant upon its authorization. The safeguards in *Berger* are held to be inadequate, and the conviction is reversed for use of the illegal evidence.

It is true that the informer, Sirles, was not a trespasser in the ordinary sense when he entered Petitioner's place of business and his residence. It is a fact, however, that Petitioner was not aware of his purposes, and that Sirles secreted his true identity as an informer working throughout each contact with Petitioner to achieve the purposes of the government agents who were directing him. Petitioner obviously was unaware that Sirles had been armed by the same agents with a radio transmitter which was beaming their every word electronically to agents secreted off the premises. These facts alone might be sufficient to distinguish this case from *Osborn*. A more critical distinction, however, is the total absence of any restraint upon agents and their undercover informer in the

use of these devices in this case. While the New York statute found to be constitutionally inadequate in the *Berger* case at least interposed a "neutral and detached authority" between the "police and the public," the repeated invasions to which Petitioner was subjected in this case constitute the kind of indiscriminate use of such devices feared in dissenting opinions in *Lopez* v. *United States*, 373 U.S. 427, 446-471 (1963). Further, it is significant that in the *Lopez* case, the defendant was aware of the official character of the man with whom he engaged in conversation, and whom he attempted to bribe. He knew that his statements to this man could be used against him in a judicial proceeding. The government agent in that case was equipped with a recorder which perpetuated what Lopez said. The conversation was not transmitted by radio to other unseen ears.

Testimony by government agents of what they overheard through their radio receivers of conversations between Petitioner and the secret informer on the several occasions prior to indictment should have been rejected as violative of constitutional rights of the Petitioner. This evidence so contravened the rights of Petitioner that its reception requires a reversal, even if there might be sufficient other evidence in the record from which the jury might have found guilt. *Spano* v. *New York*, 360 U.S. 315 (1959).

II

Rights protected to the Petitioner by the Fourth Amendment, the due process and the self-incrimination clauses of the Fifth Amendment, and the right to counsel guaranteed by the Sixth Amendment were violated by the admission of testimony of an informer and a secreted government agent concerning a post-indictment conversation between Petitioner and the informer.

The points previously made with reference to the surreptitious use of electronic listening devices to overhear

conversations between the Petitioner and the government informer prior to Petitioner's indictment and release on bail apply with equal force to the similar type incident which occurred following indictment. There are additional reasons, however, why the admission of Agent McGinnis' testimony concerning the conversation which took place between Petitioner and the informer in the informer's automobile on February 18, 1965, with McGinnis secreted in the trunk, violates constitutional rights of Petitioner.

This Court, in *Massiah* v. *United States*, 377 U.S. 201 (1964), dealt with a case that is identical in its important aspects. Following indictment, Massiah's co-defendant, Colson, became a secret government informer and permitted an agent to install a radio transmitter under the front seat of his car. Colson and Massiah held a lengthy conversation while sitting in this automobile. By prearrangement with Colson, the agent sat in a car parked out of sight and listened to the conversation. Massiah made several incriminating statements, to which the agent was allowed to testify.

The opinion of the Fifth Circuit Court of Appeals attempts to distinguish the instant case from *Massiah* on the ground that the informer apparently suggested the meeting with Massiah, while the Petitioner in the instant case apparently suggested the meeting to the informer, Sirles. This view is erroneous and overlooks the fact that Sirles had been, throughout his contacts with Petitioner, an informer for the government agent. The informer discussed the proposed meeting with the agents, and allowed one of them to enter the trunk of the informer's automobile before it proceeded to the meeting place, in order that he might overhear the conversation. It is submitted that *Massiah* is not so narrowly drawn. Both Massiah and this Petitioner engaged in their conversations with their respective informers voluntarily. Each did it without knowl-

edge of the representative character of the informer. Each did it totally unaware that, by prearrangement with the informer, government agents were secreted in position to hear the conversation. Each was on bail following indictment, and neither had his attorney present, or had any reason to believe that he was speaking to government agents. The *Massiah* opinion does not treat as important the fact that the informer might have been the first to suggest a meeting. He and Massiah undoubtedly had met and talked frequently, as had Petitioner and Sirles. The violation of the constitutional right to counsel, the right to be free from self-incrimination, and the right to freedom from unwarranted searches and seizures, each is violated by the planning which preceded the meeting and the execution of the plan to overhear surreptitiously what transpired. The dissenting opinion of Judge Ainsworth below (R. 397-405; Appendix A) correctly states the law established by *Massiah*. The rule enunciated in that case is a continuation of the pronouncements of this Court on the right of an accused to counsel from the time he is charged until the time of trial, which right is as important as the right to the aid of counsel at the trial itself. *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Spano* v. *New York*, supra.

The Court of Appeals relied upon other recent decisions to distinguish the instant case from *Massiah*. One of these was *United States* v. *Accardi*, 342 F.2d 697 (2nd Cir. 1965), but in that case the accused forced his conversation on a man he knew to be a revenue agent, asking for his help. There was no eavesdropping. The agent was allowed to testify in rebuttal during the trial. Another of these cases was *United States* v. *Gardner*, 347 F.2d 405 (7th Cir. 1965), in which the defendant and another prisoner engaged in conversation while being transported by a deputy marshal, of whose identity they were aware. The deputy was al-

lowed to testify on the trial. There was no eavesdropping, and there was no surreptitious act. Another case relied upon was *Stowers* v. *United States*, 351 F.2d 301 (9th Cir. 1965), where the defendant made certain statements to a cellmate, who later testified against him. The evidence reflects that the cellmate was not a government informer at the time he was placed in the cell with the accused, he was not acting on behalf of any government agents, and there were no agents secreted in a position to hear the conversation. To like effect is *Paroutian* v. *United States*, 370 F.2d 631 (2nd Cir. 1967). In *Lyles* v. *Beto*, 329 F.2d 332 (5th Cir. 1964), the Court of Appeals, in denying a state prisoner's petition for habeas corpus, stated:

> "The court in Lee believed that a present majority of the Supreme Court, considering all the opinions in Spano, Crooker, and Cicenia, has adopted, seriatim so to speak and not on a holding, the constitutional standard of an absolute right to counsel starting no later than after indictment. With deference, we do not find this in these cases. The question was expressly saved in Spano." (p. 338).

This judgment was vacated, and the case remanded for consideration in the light of *Massiah*, at 379 U.S. 648 (1965).

Indeed, the Court of Appeals for the Fifth Circuit has recognized that the *Massiah* decision holds inadmissible incriminating statements obtained surreptitiously after indictment, on the ground that the extraction of such statements constitutes a denial of the right to counsel. *Clifton* v. *United States*, 341 F.2d 649 (5th Cir. 1965). That case dealt with an in custody confession.

It is noted that in *United States* v. *Massiah*, 307 F.2d 62 (2nd Cir. 1962), the Court of Appeals had made the point that Massiah entered the informer's automobile of

his own free choice, and that he was equally free to speak about the case or to say nothing. It was of the opinion that the voluntary nature of his act was sufficient to uphold his conviction, but this clearly is not the law.

More recently, the Court of Appeals for the Second Circuit has interpreted *Massiah* as applying to the narrow situation where, after indictment, law enforcement officers have deliberately elicited incriminating statements from a defendant by direct interrogation or by surreptitious means. It upheld a conviction in a case where the court determined that the undercover narcotics agent to whom an incriminating statement was made had no knowledge that the defendant was under indictment and did not deliberately elicit the statement in violation of the *Massiah* rule. *United States* v. *Garcia*, ... F.2d ..... (2nd Cir. May 22, 1967). The distinguishing facts obviously are not present in the instant case. It does not appear that there was any eavesdropping, there was no knowledge of indictment, and no surreptitious means were used in *Garcia*. The reverse is true in each instance in the present case.

In a more recent case, relying on the decision of this Court in *McLeod* v. *Ohio*, 381 U.S. 356 (1965), the Court of Appeals for the First Circuit held in *Hancock* v. *White*, ... F.2d ..... (1st Cir. June 6, 1967), that post-indictment incriminating statements do not need to be deliberately elicited through subterfuge or deception to be rendered inadmissible by the exclusionary rule of *Massiah*. In this case, the failure of county police officers to advise defendant that he was entitled to the advice of counsel prior to questioning occurring during an automobile trip following an extradition proceeding was held to bar the use of his statements at trial.

Petitioner presents a case clearly within the protection of the *Massiah* doctrine. The distinction made below

would, if allowed to stand, emasculate the rule. It is the firm conviction of Petitioner that the Fifth Circuit Court of Appeals decided the constitutional question presented on this point in a manner which conflicts with *Massiah*.

CONCLUSION

The decision below upholds the conviction of Petitioner on evidence admitted in violation of rights guaranteed to him by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. That decision is in conflict with applicable decisions of this Court.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert S. Vance, one of the attorneys for Donald Croom Beatty, Jr., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6 day of July, 1967, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondent thereto by mailing a copy in a duly addressed envelope, first class postage prepaid, to the Honorable Macon L. Weaver, United States Attorney for the Northern District of Alabama, Federal Building, Birmingham, Alabama.

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